NO. 05-18-01133-CR

In the Fifth Court of Appeals of Texas

ROBERT EARL HARRELL, JR.,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal From
County Court at Law No. 1, Grayson County, Texas

In trial court case number: 2017-1-0644

APPELLANT'S BRIEF ON THE MERITS

STEVEN R. MIEARS
COUNSEL FOR APPELLANT
Texas State Bar No. 14025600
206 East College, Suite 200
Grapevine, Texas 76051
SteveMiears@msn.com
Telephone: 817-915-4006
Facsimile: 817-410-4783

JOHN HUNTER SMITH
COUNSEL FOR APPELLANT
Texas State Bar No. 24028393
707 W Washington St
Sherman, TX 75092-5639
Jsmith@wynnesmithlaw.com
Telephone: 903-893-8177
Facsimile: 903-892-0916

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Under Rule 68.4(a), Texas Rules of Appellate Procedure, the following is a complete list of the names and addresses of all parties to the trial court's final judgment, and their counsel in the trial court, and appellate counsel, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision and so the Clerk of the Court may properly notify the parties or their counsel of the final judgment and all orders of the Court of Appeals.

1. Trial Court: County Court at Law Number 1 of Grayson County, Texas; 200 S. Crockett St., Sherman, Texas 75090; Honorable James Corley Henderson presided.

2. Appellant: Mr. Robert Earl Harrell, Jr.,

3. Counsel for Appellant at Trial and on Appeal: Mr. John Hunter Smith, Texas State Bar No. 24028393, 707 W Washington St, Sherman, TX 75092-5639, Jsmith@wynnesmithlaw.com, Telephone: 903-893-8177, Facsimile: 903-892-0916

4. Associate Counsel on Appeal: Mr. Steven R. Miears, SBOT 14025600, 206 East College, Suite 200, Grapevine, Texas 76051, SteveMiears@msn.com; Telephone: 817-915-4006; Fax: 817-410-4783.

5. Counsel for the State of Texas at Trial: Mr. Michael Sissney, SBOT No. 24100348, Mr. Nathan D. Young, SBOT No. 24073628, Grayson County District Attorney's Office, 200 South Crockett, Sherman, Texas 75090, (903) 813-43615.

6. Counsel for the State of Texas on Appeal: KARLA RENAE HACKETT, Bar Card Number: 01923400, Grayson County District Attorney's Office, 200 South Crockett, Sherman, Texas 75090, (903) 813-43615.

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TO THE HONORABLE FIFTH COURT OF APPEALS:

Appellant submits this brief to support his request that the jury's verdict and sentence be reversed, and a judgment of acquittal be entered.

Statement Regarding Oral Argument

Appellant requests oral argument. Appellant believes oral argument would aid the Court in understanding Appellant's arguments in the context of these facts.

Statement of the Case

Appellant, Harrell, was charged by information with the misdemeanor offense of driving while intoxicated. Tex. Penal Code section 49.04(b). A prior conviction for DWI was alleged under section 49.09(a), making the charge a Class A misdemeanor. 1 CR 12. Tex. Penal Code section 49.09(a). A jury found him guilty. At sentencing, the Court found the enhancement allegation true. The Court assessed punishment at 365 days in jail, probated for 24 months, and a fine of $1,000.00. This direct appeal follows.

ISSUES PRESENTED……

1. Was the evidence sufficient to prove the Appellant operated a motor vehicle?

2. Question for Review: Does the sixth amendment's guarantee of the right to confrontation and cross-examination require exclusion from evidence of

non-testimonial statements by non-testifying 911 callers when the callers fabricate their identity?

Ancillary Issue: Did the trial court err in overruling Appellant's sixth amendment objection to the admissibility of the 911 recording? 3 RR 13-14, 55, 60, 64, 76-77, 90.

Statement of Facts

On March 5, 2017, at 4:04 A.M., the Van Alstyne, Texas, Police Department received a call through its 911 emergency call system. The caller identified himself or herself as Christopher Brown—the voice sounds female. Another unidentified voice that sounds male is heard on the 911 call. Neither of the two persons heard on the 911 call testified. The recorded call was admitted as State's exhibit 1 over Appellant's objections grounded in the confrontation and cross-examination clause of the sixth amendment to the U.S Constitution. 3 RR 13, 58; 69; 73; 6 RR State's 1.

The 911 callers describe being in a vehicle following a van. When asked by the 911 dispatcher for their identification the caller gives a name and driver's license number. (*See and listen* to State's Exhibit 1 which has three parts.) The witness who authenticated the 911 call agreed the caller did not sound female and was also laughing during the call. 3 RR 73. The call is not transcribed by the court reporter.

In general, the callers say they are traveling on U.S. highway 75 and are following another vehicle also traveling southbound. The vehicle is described as a grey mini-van. The caller who sounds female says the van is "all over the road," and that it "almost hit us a couple of times." The license plate given by the caller for the van was GRW 6089. The caller reports the van took exit 51C off highway 75 and turned into a McDonalds restaurant and gas station parking lot. The caller says they took the same exit and see the vehicle parked next to the gas pumps. 6 RR State's Exhibit 1.

The 911 callers are not present when an officer arrived at that location. The investigating officer does not interview the 911 callers. He obtained no identifying information for either of them. It is unknown what happened to them from this point.

During the 911 call, a Van Alstyne police officer, Brandon Blair, was dispatched to respond. Officer Blair testified he received the call at 4:00 a.m. and responded by going to the McDonalds off U.S. highway 75. 3 RR 90. The officer stated his approximate time of arrival there was 4:11 a.m. 3 RR 182. The video from the officer's dash camera was admitted into evidence as State's exhibit 3. The audio is not transcribed by the court reporter.

The officer testified he saw a grey van parked by the gas pumps. It had the license plate number identified earlier by the 911 caller. The van's engine was not

running. Appellant was seated in the driver's seat. There were two passengers in the backseat. 3 RR 93; 108-109; 134-139. Before his arrival the officer never saw the vehicle being driven. He testified:

> Q. Well, that vehicle hadn't moved -- wasn't moving when it parked. When you got there, it was already parked.
>
> A. Yes, sir, it was already parked.
>
> Q. And you're basing a time based on what dispatch or what someone else is telling you how long it's been there, right?
>
> A. Yes, sir.
>
> Q. Other than that, you have nothing independent to support how long that vehicle had sat there, do you, sir?
>
> A. Not in a -- not a timeframe, no.
>
> 3 RR 139.

The officer stated he observed the Appellant's eyes to be bloodshot, and his speech slurred. He said he smelled alcohol coming from the vehicle. Appellant said he and his passengers were coming from the casino in Choctaw, Oklahoma and were headed to Arlington. 3 RR 93-96. After having Harrell exit the van the officer administered three field sobriety tests.

Officer Blair described giving Harrell the horizontal gaze nystagmus test, the walk-and-turn test, and the one-legged stand test. Based upon the number of clues

of intoxication he observed, the officer believed Appellant was intoxicated. 3 RR 100-107.

Officer Blair testified Harrell acknowledged driving. This statement of Appellant does not appear to be recorded. The officer's testimony was:

> . . . . So, I explained to him that I understand he may not agree with everything that was going on, but I explained to him that he was reported as a reckless driver and -- and he says, well, I'm parked here, and I said, but you were driving and he replies, well, yeah.
>
> Q. Okay. So, he admitted to you that he was driving?
>
> A. That's correct.
>
> 3 RR 107; Also *see* 3 RR 109.

After interviewing the two passengers in the van, Officer Blair arrested them for public intoxication. 3 RR 108-109. They were not called to testify.

Officer Blair asked Harrell if he would give a sample of his blood to be tested for alcohol. Harrell declined. 3 RR 114. The officer obtained a search warrant for a sample of Appellant's blood. 3 RR 115. A sample of Appellant's blood was taken at a hospital in Sherman, Texas. 3 RR 116; 199. A chemist with the Texas Department of Public Safety testified. He stated the testing showed a result of .095 grams of alcohol per 100 milliliters of blood. 3 RR 242. Under Texas law, the definition of

intoxication includes having "an alcohol concentration of 0.08 or more." Tex. Penal Code § 49.01. 4 RR 190. Harrell did not testify.

The jury found Appellant guilty of DWI. Sentencing was by the trial court. The judge found the allegation of a prior conviction for misdemeanor DWI to be true. Harrell was sentenced to 365 days in jail. The jail time was probated for two years, and a fine of $1,000.00 was ordered to be paid. 5 RR 37-38.

Summary of the Argument

The only evidence corroborating Appellant's statement he was driving was the fact he was found sitting in the driver's seat of a parked vehicle with the engine not running. This was insufficient to prove he took "action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." The evidence is insufficient to prove the essential element of "operating."

The audio of the 911 call shows the callers were deceptive about their identities. While the statements on the 911 call were non-testimonial, the callers themselves lacked sufficient indicia of reliability. Failing to show their unavailability or call them as witnesses resulted in the Appellant being deprived of his sixth amendment right to confront and cross-examine them.

Argument

Issue One Restated and Argument:

1. Was the evidence sufficient to prove the Appellant operated a motor vehicle?

The law provides that, “A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.” Tex. Penal Code § 49.04. The term "operating" is not defined by the Code. *Kirsch v. State*, 357 S.W.3d 645, 651 (Tex. Crim. App. 2012). In assessing the sufficiency of the evidence to prove the element of "operating," courts look to the totality of the circumstances. *Id.,* at 651. That evidence must "demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Id.* at 650-51.

A defendant's extrajudicial confession to driving does not by itself constitute legally sufficient evidence of operating. The *corpus delicti* doctrine requires evidence independent of an extrajudicial confession show the "essential nature" of the charged crime was committed. *Hacker v. State*, 389 S.W.3d 860, 865-66 (Tex. Crim. App. 2013). In *Hacker*, the Court of Criminal Appeals explained the *corpus delicti* rule: "When the burden of proof is 'beyond a reasonable doubt,' a defendant's extrajudicial confession does not constitute legally sufficient evidence of guilt absent independent evidence of the *corpus delicti*." *Id.,* at 865.

The corroborating evidence requirement ensures that a person admitting to a crime is not convicted without independent evidence the crime actually

occurred. *Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002). The corroborating evidence need not prove the underlying offense conclusively. But there must be evidence that renders the commission of the offense more probable than it would be without the evidence. *See, e.g., McCann v. State, 433 S.W.3d 642, 646 (Tex. App.—Houston [1st Dist.] 2014, no pet.)*; *Robison v. State,* No. 06-17-00082-CR, 2017 Tex. App. LEXIS 9713, at 5-6 (App.—Texarkana Oct. 18, 2017). A conviction must be reversed when the evidence fails to corroborate an extrajudicial confession that the defendant was operating a vehicle. *Threet v. State*, 157 Tex. Crim. 497, 250 S.W.2d 200 (1952).

Courts have found corroborating evidence of operating when no one observed the defendant driving. For example, in *Robison v. State*, No. 06-17-00082-CR, 2017 Tex. App. LEXIS 9713, at 7-8 (App.—Texarkana Oct. 18, 2017), the Court found the evidence sufficient because the defendant matched the description given of the person seen driving. In *Dansby v. State,* 530 S.W.3d 213, 225-26 (Tex. App.—Tyler 2017), the defendant told the Deputy that his truck was parked outside. The truck was found running in the parking lot of a convenience store and Whataburger two doors down from where the defendant's credit card had recently been used to buy beer. The defendant was found sitting alone inside Whataburger. In *Pace v. State*, No. 05-16-00167-CR, 2017 Tex. App. LEXIS 533, at 8 (App.—Dallas Jan. 23,

2017), the defendant told the officer he had backed into a parked car. This fact was corroborated by witnesses.

Other cases where the evidence of operating was found sufficient include: *Paciga v. State*, No. 09-14-00424-CR, 2016 Tex. App. LEXIS 11857 (App.—Beaumont Nov. 2, 2016); *Huff v. State*, 467 S.W.3d 11 (Tex. App.—San Antonio 2015); *Arocha v. State*, No. 02-14-00042-CR, 2014 Tex. App. LEXIS 13285 (App.—Fort Worth Dec. 11, 2014). In these cases, there was a clear admission to driving by the defendant coupled with independent evidence of him operating the vehicle.

In *Arocha,* the court of appeals observed that the appellant explained how the crash occurred. The officer made independent observations about how the accident happened. He confirmed Appellant's statements. The Court said that a driver of an automobile involved in a wreck would be able to relay accurate information about the wreck. The Court held the corroboration sufficient because the evidence showed a link between the officer's independent conclusions about how the wreck occurred and appellant's statements about the wreck. This produced a greater likelihood that appellant drove the truck that was still at the scene. *Id.,* at 6-8.

Several cases have found the corroborating evidence lacking. In *Hanson v. State*, 781 S.W.2d 445 (Tex. App.—Fort Worth 1989), the defendant was found standing next to a wrecked vehicle. Without more, her admission to driving was held

to be insufficiently corroborated. Reversal was necessary in *Coleman v. State*, 704 S.W.2d 511, 512 (Tex. App.—Houston [1st Dist.] 1986). In *Coleman*, the defendant admitted to officers at the scene of an accident he had been driving when the accident happened. The Court noted there was another passenger present and no evidence the defendant owned the vehicle. The evidence was held insufficient.

In *Ballard v. State*, 757 S.W.2d 389, 390 (Tex. App.—Houston [1st Dist.] 1988 pet.ref'd), the defendant was found unconscious sitting behind the steering wheel of a vehicle parked on the side of the road. The engine was running. He confessed to having driven the vehicle earlier. The evidence was held insufficient to corroborate the confession. The Court observed there was no testimony showing how long the car had been parked on the shoulder, how long appellant had been intoxicated, how long he had been in the car, who had parked the car, whether he was intoxicated before or when the car was parked, or the ownership of the car.

In *Reddie v. State*, 736 S.W.2d 923, 925 (Tex. App.—San Antonio 1987, pet. ref'd), the evidence showed the defendant was found asleep in the driver's seat. But no one saw him drive, and no one knew whether another person had been in the car. The Court noted there was no evidence showing who owned the vehicle.

Appellant is mindful that *Ballard* and *Reddie* preceded *Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991). Since *Geesa,* the evidence no longer must rule out all other reasonable hypotheses in circumstantial evidence cases to sustain

a conviction. The same sufficiency analysis is applied to cases proved by circumstantial evidence as those proved by direct evidence. There must, however, still be evidence—not speculation—to prove operating.

In *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007), the Court explained the difference between an inference and speculation. "An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt."

The evidence showing Harrell ever admitted to the officer he was driving was thin. The statement was not recorded; it is not in writing. 3 RR 107-109. *If* there was an admission, there was no testimony establishing he admitted to driving into the gas station's parking lot. There was no testimony he admitted to driving on highway 75. There was no testimony he admitted he was the driver of the van observed by the 911 caller.

The facts differ from cases where the evidence was found sufficient. Here there was no accident, no proof Harrell owned the van, and no one identified him as driving. The vehicle was legally parked. It was not shown that the keys were in the ignition. The motor was not running. Other adults besides Appellant were in the

vehicle. Both of these men were intoxicated and arrested for public intoxication. Neither the officer's investigation nor the State's evidence excluded them as the driver. The State did not seek their testimony.

If the 911 caller was telling the truth, some indeterminate length of time elapsed from when the 911 call came in to the police until the officer located the vehicle. The 911 callers were never seen by any person who testified. No efforts to have them appear later for an interview were ever made. Only by faith in the truthfulness of the 911 callers may it be concluded they saw the van being operated shortly before the officer arrived. Nothing proved how long the van had been parked before the officer's arrival.

Finding Appellant in the driver's seat is no evidence he "operated" the vehicle. To prove the element of "operating" the evidence must "demonstrate that [Harrell] took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Kirsch,* 357 S.W.3d at 650-51. There is no evidence Harrell did anything other than sit in the vehicle. Sitting in the driver's seat does not affect the functioning of a vehicle. The engine was not running. There was no evidence the keys were in the ignition. There was no evidence Harrell did any act which would enable the vehicle's use.

This Court should reverse and render a judgment of acquittal.

Issue Two Restated and Argument

Question for Review: Does the sixth amendment's guarantee of the right to confrontation and cross-examination require exclusion from evidence of non-testimonial statements by non-testifying 911 callers when the callers fabricate their identity?

Ancillary Issue: Did the trial court err in overruling Appellant's sixth amendment objection to the admissibility of the 911 recording?

Appellant's objections to the admission into evidence of the 911 call as denying his right to confront and cross-examine witnesses against him were overruled. 3 RR 13-14, 55, 60, 64, 76-77, 90.

The U.S. Constitution's Bill of Rights guarantees that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ." U.S. Const. amend. 6. Confrontation clause cases involving the admission of out-of-court statements reflect a long-standing recognition that the literal right to confront the witness during trial forms the core of the values furthered by the Confrontation Clause. *See, e.g.*, *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15 (1985). Cases such as *Ohio* v. *Roberts*, 448 U.S. 56 (1980), caused Confrontation Clause issues because hearsay evidence was admitted as substantive evidence against the defendants.

In *Maryland v. Craig*, 497 U.S. 836, 849, 110 S. Ct. 3157, 3165 (1990), the Court wrote: "In sum, our precedents establish that 'the Confrontation Clause reflects a preference for face-to-face confrontation at trial,' a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'" The same year *Maryland v. Craig* was decided the Court issued its opinion in *Idaho v. Wright,* 497 U.S. 805, 814-15, 110 S. Ct. 3139, 3146 (1990).

In *Idaho v. Wright* the Court said that the Confrontation Clause operates in two distinct ways to restrict the range of otherwise admissible hearsay. In keeping with the preference for face-to-face confrontation, the Sixth Amendment first establishes a rule of necessity. The prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. Second, the out of court statement must have sufficient indicia of reliability. *Id. at* 814-15. The Texas Court of Criminal Appeals embraced this view in *Buckley v. State,* 786 S.W.2d 357, 359 (Tex. Crim. App. 1990). In *Buckley,* the Court said, "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." *Buckly* has never been overruled.

In *Crawford v. Washington* (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, the Court held the confrontation clause of the Constitution's Sixth Amendment barred the admission of testimonial statements of a witness who did not

appear at trial, unless the witness was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The question of what constitutes a testimonial statement in a 911 call was explored in *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006). *Davis* held that statements from a 911 caller are non-testimonial if they are made under circumstances objectively indicating their primary purpose was to enable police assistance to meet an ongoing emergency.

Crawford involved a witness unavailable to testify because of the assertion by the witness of marital privilege. *Crawford,* 541 U.S. at 40. In *Davis,* it is unclear whether the witness was unavailable. The Court said the complainant "presumably" could have testified, but she did not appear. *Davis,* 547 U.S. at 819. *Crawford* and *Davis* addressed whether the hearsay statements were testimonial. Neither *Crawford* nor *Davis* address directly whether a showing that the declarant is unavailable is required for non-testimonial statements. However, *Crawford* posits:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374.

In *Ohio v. Clark*, 135 S. Ct. 2173 (2015), the Court expounded on that view by stating the sixth amendment is indifferent to non-testimonial statements. "Thus,

under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. 'Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.' " *Id.* at 2180, *quoting*, *Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143 (2011).

These statements were consistent with the holding of *Ohio v. Roberts*. "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. at 66, 100 S. Ct. at 2539.

In *Ford v. State*, No. 08-14-00093-CR, 2016 Tex. App. LEXIS 2496 (App.—El Paso Mar. 9, 2016 pet. ref'd), the Court followed *Davis* and held that the 911 caller's statements were non-testimonial. The 911 declarant did not testify. The statements, otherwise being hearsay, were found admissible as an excited utterance. The Court held the admission of the 911 call did not violate the sixth amendment. In footnote, the Court addressed whether non-testimonial statements require showing the declarant's unavailability.

> In light of our determination that Walker's statements to the 911 dispatcher were not testimonial, we need not address whether the State established that Walker was 'unavailable' to testify at trial or whether Appellant had a prior opportunity to cross-examine her prior to trial.
>
> *Id.,* at 21-22, n.6.

Knight v. State, No. 08-16-00123-CR, 2018 Tex. App. LEXIS 6411 (App.—El Paso Aug. 15, 2018), *Rosenbusch v. State*, No. 03-18-00096-CR, 2018 Tex. App. LEXIS 10862 (App.—Austin Dec. 28, 2018 no pet. h.), and *Gilbert v. State*, No. 07-16-00378-CR, 2017 Tex. App. LEXIS 10039, at *3-4 (App.—Amarillo Oct. 25, 2017 pet. ref'd) are in accord with *Ford.* These cases hold the sixth amendment requires no showing of the unavailability of a 911 caller to testify when the statements are non-testimonial.

In *Ford,* the 911 caller was identified as the defendant's girlfriend who was in the car with the defendant and reporting him to be intoxicated. *Ford*, at 1.

In *Knight*, the 911 caller was the defendant's girlfriend who was identified and interviewed by police. An officer's testimony authenticated the voice of the caller from speaking with her the night of the arrest. *Knight,* at 4.

In *Rosenbusch,* two 911 callers report a woman being violently assaulted in a parking lot. While not set forth in the opinion, the State's brief on appeal shows the two callers were identified by name and as employees of the Walmart. *See* State's brief on Appeal, at p. 1-3 on the Court's web site:

http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=328bb205-0e8c-4a17-b25d-15ec14874dd5&coa=coa03&DT=Brief&MediaID=d3741e27-729d-4d47-9a44-f3720753c159.

In *Gilbert,* the Court noted the caller continued to observe appellant's vehicle and stayed on the phone until the officer arrived at the scene. *Gilbert,* at 6. Additional facts set forth in the State's brief were, "The operator then obtained the caller's address and current location, and then asked her if she was in a safe location such that officers could talk to her if need be (State's Exhibit l). The caller said that she was in such a location, she agreed to wait, and she said that she would turn her flashers on (State's Exhibit 1)." *See* State's brief on the web at p. 8. http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=0afc3752-debb-4416-9bbc-e2a793bd4db4&coa=coa07&DT=Brief&MediaID=db4ba3ba-0325-4c86-8286-6b25489f493e.

Here, the statements by the 911 caller arguably were not testimonial under the holding of *Davis*. The trial court found them to be non-testimonial statements and admissible under the hearsay exception of excited utterance. 3 RR 26; 59. Texas Rules of Evidence 803(1) (the present sense impression exception) and 803(2) (the excited utterance exception) permit the admission of hearsay statements. Under these exceptions to the hearsay rule the statements are admissible regardless of the declarant's availability. Tex. R. Evid. 803. A trial court's decision to admit such

statements is reviewed under an abuse-of-discretion standard and will not be reversed absent a clear abuse of discretion. *McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008).

The statements of the 911 caller about the vehicle's operation on the road were admitted for their truth, and not just to explain the actions of the investigator or to establish a reasonable suspicion to investigate. (*See, e.g.*, *Navarette v. California*, 572 U.S. 393, 134 S. Ct. 1683 (2014), holding that an anonymous 911 caller's statements may establish a reasonable suspicion for an investigation.)

At trial, it was established that the identity of the 911 caller was supposedly known by the State. This information included a name, address, and phone number. 3 RR 22. But the State did not try to locate either of the two persons whose voices are heard on the call. 3 RR 17-19. No person authenticated either voice as belonging to a Christopher Brown. Whoever these callers were, they did not stay around to be interviewed or identified. This distinguishes this case from the facts in *Ford, Knight, Rosenbusch* and *Gilbert.*

The State never attempted to show the 911 callers were unavailable to testify or explain their absence. Instead, the State merely had to push the "play" button and the 911 call was heard by the jury. There was no opportunity for the Appellant to cross-examine or confront the witnesses.

In *Crawford*, the Court reaffirmed its earlier holding that a defendant forfeits his right to complain about a confrontation violation when he brings about the declarant's unavailability through wrongdoing. The doctrine of forfeiture by wrongdoing prevents a criminal defendant from profiting from his own misconduct. *Crawford,* at 1370. The same equitable concerns should preclude the State's use of a 911 call absent showing the 911 caller was at least truthful in providing their identifying information.

Information given by the caller about the van's color, its license plate number, and the location where it was parked was corroborated by the officer. But nothing corroborated the erratic driving described by the 911 callers. The 911 caller's statements were not made under oath and under the penalty of perjury. Their competency, personal knowledge, motive, bias, and prejudice were not subject to questioning. While these statements would establish a reasonable suspicion for the officer's investigation, they should not have been admitted to prove intoxication.

As recently re-affirmed by the Texas Court of Criminal Appeals, "The Confrontation Clause gives a criminal defendant the right 'to be confronted with the witnesses against him.' '[I]t is that personal presence of the defendant and the right to ask probing, adversarial cross-examination questions that lies at the core of an American criminal trial's truth-seeking function.' An attack on a witness's credibility may be 'effected by means of cross-examination directed toward

revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.' Defense counsel should be permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, can appropriately draw inferences relating to the reliability of the witness." *Balderas v. State*, 517 S.W.3d 756, 775 (Tex. Crim. App. 2016).

Sanctioning the admissibility of an unidentified 911 caller's statements which fit within an exception to the hearsay rule invites deceit by a 911 caller; perhaps even indolence or gamesmanship by the government. Any person can call 911, purport to identify themselves, and profess to describe an on-going crime requiring an emergency police response. With today's cell phone and remote video technology such an artifice can be accomplished from anywhere in the world. The presumed "indicia of reliability" of the "firmly rooted" exceptions to the rule against hearsay of "excited utterance" and "present sense impression" cannot protect against the malevolence of a declarant no one has seen.

In this case, nothing corroborated the statements of the 911 callers about the van's operation on the roadway. No witness appeared in court to swear that he saw the van being driven. The 911 callers were never seen by any person. The 911 callers were never interviewed in person by the police or prosecutors. No affidavit or signed witness statement was ever obtained from these persons. Nothing was presented which corroborated the driver's license given, or names of the 911 callers.

Significantly, listening to the 911 call shows something was not on the "up-and-up" regarding the callers. The primary caller's voice appears to be female, but a male name is given. It is apparent from the call that an unidentified male is relaying identifying information to the female.

In this case the declarants' "excited utterances" or "present sense impressions" lack the "sufficient indicia of reliability" to cause their statements to be "firmly rooted" in those hearsay exceptions. This court should hold that, on these facts, absent showing unavailability there is a strong constitutional preference for face-to-face confrontation of a 911 caller. This premise is not contrary to Rule 803 of the rules of evidence. That Rule is prefaced with the statement: "The following are not excluded *by the rule against hearsay*, regardless of whether the declarant is available as a witness: . . ." (Emphasis added.) Excluding these statements under the guarantees of the sixth amendment follows the law that Rules of Evidence are not elevated above constitutional guarantees. *See,* Tex. Rule Evid. 101 (d).

The first Rule of Evidence is that, "Despite these rules, a court must admit or exclude evidence if required to do so by the United States or Texas Constitution, a federal or Texas statute, or a rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals. If possible, a court should resolve by reasonable construction any inconsistency between these rules and applicable constitutional or statutory provisions or other rules." Tex. Evid. R. 101.

Rule 803's exceptions to hearsay for excited utterances and present sense impressions are premised upon the statements being inherently reliable. The indicia of trustworthiness are based on the declarant's lack of an opportunity to fabricate, and the involuntariness of the statement. The statements are reactive, not reflective. Here, however, it is the callers' reflective dishonesty to the 911 dispatcher about their identities which births a sixth amendment violation. Had any person seen the callers, verified their identities, or even corroborated their presence on the highway that night, the constitutional violation would not exist. But under these facts, at a minimum, the State should have been required to at least explain their unavailability to appear in court. This Court should reverse.

Prayer

Wherefore, premises considered, Appellant prays the Court sustain his points of error, and reverse the judgment and sentence.

RESPECTFULLY SUBMITTED,

/s/ Steve Miears

STEVEN R. MIEARS
COUNSEL FOR APPELLANT
Texas State Bar No. 14025600
206 East College, Suite 200
Grapevine, Texas 76051
SteveMiears@msn.com

Telephone: 817-915-4006
Facsimile: 817-410-4783

CERTIFICATE OF SERVICE

The undersigned certifies that true copy of the foregoing brief on appeal was delivered by e-filing to the Grayson County District attorney by forwarding a copy to Ms. KARLA RENAE HACKETT through e-filing on the date of filing.

/s/ Steve Miears

STEVEN R. MIEARS

Certificate of Word Count

The undersigned certifies that the brief on appeal comprises 6,149 words as calculated by Word for Windows which is within the limit of the Rules for lengths of briefs.

/s/ Steve Miears

STEVEN R. MIEARS